

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
911 Fee Diversion)	PS Docket No. 20-291
)	
New and Emerging Technologies 911)	PS Docket No. 09-14
Improvement Act of 2008)	

To: The Commission

PETITION FOR RECONSIDERATION

The Boulder Regional Emergency Telephone Service Authority (“BRETSA”),¹ by its attorney, hereby petitions the Commission to reconsider its June 25, 2021 Report and Order in the above-captioned proceeding.² In support whereof, BRETSA respectfully states:

I. The Commission’s Determination That It Can Find Taxing Jurisdictions in Violation of Its Rules Without Appropriate Procedural Safeguards Is Based Upon a Misreading of Section 902.³

In their Comments BRETSA and other parties raised the fact that the Commission Fee Reports were improperly making findings that States and taxing jurisdictions (“Taxing Jurisdictions”) had diverted 9-1-1 Fees based upon *survey responses*, generally prepared without assistance of counsel, without an on-the-record hearing with the right to introduce evidence, or of administrative or judicial review. The Commission dismissed these concerns stating that Congress (i) directed the Commission to adopt final rules defining the acceptable uses of 9-1-1 Fees and to rule on petitions for determination for additional uses, and (ii) did not alter the well-established data collection and reporting process the Commission has used in preparing its

¹ BRETSA is a Colorado 9-1-1 Authority which establishes, collects and distributes the Colorado Emergency Telephone Surcharge to fund 9-1-1 service in Boulder County, Colorado.

² *911 Fee Diversion; New and Emerging Technologies 911 Improvement Act of 2008* (Report and Order in PS Docket Nos. 20-291 and 09-14), FCC 21-80 (June 25, 2021)(“*Report and Order*”).

³ Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, Division FF, Title IX, Section 902, Don’t Break Up the T-Band Act of 2020 (Section 902).

annual fee diversion reports, and (iii) “implicitly affirmed” the Commission’s existing reporting processes by requiring that federal grant recipients participate in the annual data collection. In fact, a fair reading of the statute mandates the *opposite* conclusion.

Section 615a-1(f)(3)(A), mandated that the Commission “issue final *rules* designating purposes and functions for which the obligation or expenditure of 9-1-1 fees or charges, by any State or *taxing jurisdiction*...is acceptable.”⁴ Future Fee Accountability Reports will no longer assess obligation or expenditure of 9-1-1 Fees for the purpose for which they are specified under state law or local ordinance, or according to federal grant criteria. *They will instead assess whether Taxing Jurisdictions have violated Commission’s Rules.*

The intent of the rules Congress directed Congress to adopt and of the Fee Accountability Report is clearly punitive, to compel Taxing Jurisdictions to use 9-1-1 Fees solely for purposes Congress deems acceptable. Federal 9-1-1 grant funds have been and will be denied, criminal penalties might be imposed upon Taxing Jurisdictions which engage in “Fee Diversion,”⁵ and the Commission even proposed denial of unrelated federal benefits such as denial of federal highway funds.⁶

BRETSA is unaware of any cases involving *adjudication-by-survey* of violations of an agency’s rules. Section 615a-1(e)(2) provides that the Commission shall enforce the section as if it was a part of the Communications Act of 1934, and that violations of the section or regulations promulgated thereunder “shall be considered to be a violation of the Communications Act of 1934 or a regulation promulgated under the Act, respectively.” It is unclear how adjudication-by-survey (with the surveys apparently completed by administrators without assistance of counsel,

⁴ 47 U.S.C. §615a-1(f)(3)(A)(Emphasis added).

⁵ See 47 U.S.C. § 615a-1 Statutory Notes (as amended); section 902(d)(3)(B)(ii).

⁶ *911 Fee Diversion; New and Emerging Technologies 911 Improvement Act of 2008*, PS Docket Nos. 20-291 and 09-14, Notice of Inquiry, 35 FCC Rcd 11010, 11016-17, para. 19 (2020)

let alone counsel experienced in the such matters) can pass muster under the Title 47, the Administrative Procedure Act, or the Constitution and is not in itself an abuse of discretion; let alone where (i) sanctions will be applied to Taxing Jurisdictions which have no more control over a third-party's Fee Diversion than the Commission has had over diversion of Fees by several States, and (ii) the Commission itself does not enforce sanctions against parties that will be sanctioned by other agencies upon its finding of fee diversion.⁷

II. Taxing Jurisdictions Cannot Be Held Responsible for Fee Diversion by Another Taxing Jurisdiction.

The Commission finds that “it is consistent with the intent of section 902 to hold states responsible for fee diversion by localities within their boundaries,”⁸ and states that (i) “[a]bsent such a policy, states or taxing jurisdictions could have an incentive to avoid oversight or accountability for expenditures by political subdivisions,” (ii) “the petition for determination process established by Section 902 provides a mechanism for further consideration of this issue in the context of specific fact patterns,” and (iii) “decisions with respect to grant eligibility will be made by the agencies managing the grant program, not the Commission.”⁹

It is true that the Net 911 Act requires the Commission to report on the status in each State of the collection and distribution of 9-1-1 Fees; but it also requires the Commission to include in the report findings on “*each State or political subdivision*” which has misused 9-1-1 Fees.¹⁰ The section does not condone labelling *all* Taxing Jurisdictions in a State as Fee Diverters based on the actions of other Taxing Jurisdictions. It indeed required quite the opposite; that the Commission include findings on *each* Taxing Jurisdiction which diverted 9-1-1 Fees.¹¹ Section

⁷ See Section II, at 4 hereinbelow.

⁸ Report and Order, para. 26 at 12.

⁹ Report and Order, para. 26 at 12.

¹⁰ 47 U.S.C. § 615a-1(f)(2)(Emphasis added).

¹¹ The Commission's Fee Accountability Reports have in fact provided a summary of the collection and distribution of 9-1-1 Fees in each State, and included its findings on Fee Diversion by States and local taxing jurisdictions.

902 amended 47 U.S.C. § 615a-1(f) to add new subsections (3) and (4) which repeatedly use the phrase “State *or* taxing jurisdiction)” using the disjunctive “or.” Section 902(d)(4) also provided that any “State *or* taxing jurisdiction” identified by the Commission in the Fee Accountability Report to have diverted funds, shall be ineligible to participate or send a representative to serve on committees, panels, or councils.

In the Report and Order, the Commission “clarif[ied] that this latter prohibition will not extend to representatives of non-diverting localities that are located within diverting states,”¹² thus declining to apply sanctions for Fee Diversion against all Taxing Jurisdictions in a State. The Commission cannot reconcile finding a State and all Taxing Jurisdictions in the State in which one or more but not all taxing jurisdictions had diverted funds to have violated the Commission’s Rules, including for purposes of the Fee Diversion Report and denial of federal grant funds for 9-1-1, but not for advisory committee participation pursuant to Section 902(d)(4) and Section 9.26 of the Rules, 47 C.F.R. § 9.26.

Each of the rationales given by the Commission for finding a State and all Taxing Jurisdictions in the State to have violated its Rules and be subject to sanction based on the action of even a single Taxing Jurisdiction, fails. Not holding a State responsible for a local taxing jurisdiction’s diversion of 9-1-1 Fees does *not* create an incentive for a State to avoid oversight. To the contrary, unfairly labelling a State a Fee Diverter and sanctioning all Taxing Jurisdictions would create an incentive for a State to overlook isolated Fee Diversions in completing the Fee Surveys.

There is no basis for the Commission to assume that a State or local taxing jurisdiction has the authority and ability to exercise oversight of (other) local taxing jurisdictions to *prevent* a

¹² Report and Order, para. 76 at 36.

(another) local taxing jurisdiction's Fee Diversion. Even in States which do *not* have home-rule cities and counties; cities and counties are independent governmental entities and not part of state government. A State's adoption of annual reporting requirements similar to those adopted by the Commission might *deter*, but not *prevent* Fee Diversion any more than the Commission has been able to fully prevent Fee Diversion by, or in, five States.

The fact that Taxing Jurisdictions can file petitions for determination does not remedy the Commission's announced intent to label an entire State a Fee Diverter and deny the State and all local taxing jurisdictions federal benefits based upon the acts of even a single Taxing Jurisdiction. The time and expense of filing such petitions will prevent many Taxing Jurisdictions from filing petitions, and would divert 9-1-1 Fee and other resources from 9-1-1 Service, frustrating Congressional intent. By the time petitions are decided, Taxing Jurisdictions will have continued to spend 9-1-1 Fees for purposes now prohibited by rule, resulting in their respective States being found in violation of the Rules if the Petitions are denied and all Taxing Jurisdictions in the State being sanctioned.

While decisions regarding grant eligibility will be made by the agencies managing grant programs; Commission findings of violation of *its* rules must be Constitutionally sound. The Commission cannot assume the agencies managing grant programs will entertain collateral attacks on Commission decisions that Taxing Authorities have violated its rules, rather than giving its decisions full faith and credit. The Commission's approach will also put innocent Taxing Authorities in States labeled Fee Diversifiers, based on the actions of individual local taxing authorities, at a disadvantage in obtaining grant funds. They will have to overcome a presumption that the Commission's finding of fee diversion is valid.

The Commission's deeming States' Fee Diverters, such that all Taxing Jurisdictions in the State will be penalized based upon Fee Diversion by even a single Taxing Jurisdiction, is arbitrary, capricious and an abuse of discretion. The Commission must limit findings of Fee Diversions to States *or* local taxing jurisdictions it finds violated its 9-1-1 Fee Rules.

III. The Commission's Failure to Provide Taxing Jurisdictions A Grace Period to Comply with Its New Rules is Arbitrary, Capricious and an Abuse of Discretion.

Prior to release of the Report and Order, Fee Diversion did not violate the Commission's Rules, although it might impact a Taxing Jurisdiction's eligibility for federal 9-1-1 grants. As required by Congress in Section 902, the Commission has now adopted *Rules* regarding permissible uses of 9-1-1 Fees. By refusing to provide a grace period for Taxing Jurisdictions to bring their practices into compliance with the new Rules, the Commission is placing them in immediate violation of the Rules and frustrating, rather than supporting Congress intent.

In requiring the Commission to adopt rules regarding permissible uses of 9-1-1 Fees, and proposing federal grants to Taxing Jurisdictions to 9-1-1; Congress goal is clearly to have Taxing Jurisdictions use 9-1-1 Fees to support receipt, processing, and dispatch of 9-1-1 Calls, and to fund improvements in the 9-1-1 systems and service for the benefit of the public residing in or visiting the Taxing Jurisdictions. Refusal to provide a grace period to comply with the new Rules places Taxing Jurisdictions in violation of the new Rules (even if they have not violated the rules but another Taxing Jurisdiction in the State has), and prevents their receipt and use of federal grant funds to improve 9-1-1 systems and services.

In other instances in which the Commission adopted or amended rules, it has provided a grace period for parties to come into compliance.¹³ Taxing Jurisdictions which do not fully

¹³ See, e.g., *Amendment Of Part 74, Subpart K, Of The Commission's Rules And Regulations Relative To Community Antenna Television Systems*, 39 F.C.C.2d 377, 391 (1973)(Commission grants two-year extension of grace period for divestiture of stations to comply with cross-ownership rule to avoid hardship to existing cross-

comply with the new rules should be provided a grace period consistent with Commission precedent. Taxing Jurisdictions may need to modify their budgets, which can be difficult during the budget year or even after the jurisdiction's budget planning has progressed to the point that significant changes will be difficult to complete before budget deadlines. Tax increases may require voter approval or otherwise take time to implement. Statutory changes also take time, particularly where legislative sessions last only a portion of the calendar year. Some State constitutions also prohibit governmental entities from incurring debt.¹⁴

The Commission has referred to the “Strike Force” the question of “whether expenditures of 9-1-1 fees for public safety radio systems and related infrastructure should be considered acceptable for Section 902 purposes.”¹⁵ Section 902 provides for Taxing Jurisdictions to petition the Commission for determination whether a specific use of 9-1-1 Fees should be permissible.¹⁶ The Commission also provided State and local jurisdictions a “safe harbor” of specifying the

owners); *Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 5 FCC Rcd. 7212, 7232 (1990) FM Translator operations granted 3-year grace period to comply with more stringent technical rules in light of limited revenues of many licensees and to avoid service disruptions to the public); *Applicability of 47 C.F.R. § 73.658(g) and 47 C.F.R. § 73.658(k) to Home Shopping Inc.*, 4 F.C.C. Rcd 2422, 2424 (1989)(There is ... precedent for waiving the prime time access rule in situations where circumstances make application of the rule illogical and contrary to the Commission's goals"); *Amendment of Parts 13 and 80 of the Commission's Rules Concerning Maritime Communications*, 21 FCC Rcd 10282, 10299 (2006)(Commission provides grace periods of one-to-four years for applying for certification non-compliant radios, and three-to-seven years for manufacture, importation, sale and installation of non-compliant radios, and indefinitely grandfathered use of non-compliant radios, “to ensure that manufacturers' investment in the design and manufacture of new SC101 radios is not stranded,” “provide manufacturers and vendors with enough time to exhaust their inventories of non-handheld SC101 equipment,” and “giv[e] vessel operators a reasonable opportunity to budget for the purchase of equipment meeting the new standards”); and IB Docket No. 12-267 in which the Commission provided a two-year grace period for compliance with updated Automatic Transmitter Identification System (“ATIS”) requirements for digital video uplinks from temporary-fixed earth stations (*Comprehensive Review of Licensing and Operating Rules for Satellite Services*, 28 FCC Rcd 12403, 12470 (2013)), subsequently issued a one-year blanket waiver of the updated ATIS requirement to update the record on the anticipated costs of compliance (*Temporary Waiver of Section 25.281(b) Transmitter Identification Requirements for Video Uplink Transmissions*, 31 FCC Rcd 1752 (2016)), and subsequently waived the requirement for equipment that cannot be made compliant with a software upgrade to avoid unduly burdening operators (*Implementation of Section 25.281(b) Transmitter Identification Requirements for Video Uplink Transmissions*, 32 FCC Rcd. 6233, 6235 (2017)).

¹⁴ See, *Colo. Const. Art. XI, Section 1, 6*. While bonds may be issued with voter approval pursuant to *Colo. Const. Art. XI, Section 6*, bond issues are not a sufficiently expeditious means to raise funds.

¹⁵ Report and Order, para. 12 at 6.

¹⁶ 47 U.S.C. 615a-1(f)(5).

amount or percentage of a multi-purpose fee which is to be used to fund 9-1-1 Services.¹⁷ Absent a grace period, however, the relief promised by Strike Force recommendations of radio assets on which 9-1-1 Fees may be spent, petitions for determination, and the safe harbor are illusory.

Taxing Authorities whose practices violate the new rules are already “Fee Diverters,” well before Strike Force recommendations can be adopted, petitions for determination will be acted upon, or Taxing Jurisdictions can modify statutes or ordinances to come within a safe harbor.

Congress and the Commission’s intent is purportedly to prevent diversion of 9-1-1 Fees to assure that 9-1-1 Service is well-funded. However for the Commission to (i) make it impossible for Taxing Jurisdictions to implement necessary changes to bring their use of fees within the Commission Rules, and (ii) thereby assure that Taxing Jurisdictions whose uses of 9-1-1 Fees do not comply with the new Rules *ab initio* (and every other Taxing Jurisdiction in the same State) will be denied Federal Grants to improve 9-1-1 Service, contravenes that intent.

The Commission’s refusal to provide Taxing Jurisdictions a grace period to comply with the new rules, consistent with its precedent, is arbitrary, capricious and an abuse of discretion.

IV. 9-1-1 Authorities Must Be Permitted to Offset General Funds Expended on Permissible Expenses Against 9-1-1 Fees Expended on Non-Permissible Expenses.

In its Comments, BRETSA provided the hypothetical of payment of PSAP personnel salaries and provision of benefits through the County, City or Agency Human Resources Department and personnel system, providing greater efficiencies and economies of scale even though personnel costs are *permitted* uses of 9-1-1 Fees. A Taxing Jurisdictions could less-efficiently use 9-1-1 Fees to compensate and provide benefits for PSAP personnel, and use the General Funds thereby freed-up to pay for radio facilities previously funded with 9-1-1 Fees, for example; but it would be more efficient and limit the amount of 9-1-1 Fees charged to allow

¹⁷ Report and Order, para. 21 at 10.

Taxing Jurisdictions to offset general funds spent for permissible purposes against 9-1-1 Fee expenditures on impermissible purposes. The Commission's failure to recognize that money is fungible, and economies which reduce PSAP costs permit increased funding of 9-1-1 Service with lower 9-1-1 Fees is arbitrary, capricious and an abuse of discretion.

The Commission failed to address BRETSA's recommendation, although it would be much less burdensome and more cost-effective to have Taxing Jurisdictions state (i) total 9-1-1 Fees remitted, (ii) total permissible expenses incurred and (iii) the amount of remitted 9-1-1 Fees carried forward to the succeeding year. If the sum of permissible expenses and carried funds equals or exceeds the 9-1-1 Fees remitted, the Taxing Jurisdictions would be in compliance with the Rules. The Commission should modify the rules accordingly.

V. The Commission's Determinations Regarding Use Of 9-1-1 Fees for Radio Equipment Is Confusing and Contrary to Statute.

The same repeaters and mobile or portable radios are used both for dispatch of First Responders, and for First Responders to communicate with each other to coordinate Emergency Responses.¹⁸ Thus the Commission's statement that:

[T]he [Commission] has found that radio networks used by first responders are "technically and operationally distinct from the 911 call-handling system."¹⁹

is incorrect and confusing. Indeed, Section 615a-1(f)(5)(B)(ii) authorizes use of 9-1-1 Fees for a purpose or function that "has a direct impact on the ability of a public safety answering point to— (I) receive or respond to 9-1-1 calls; or (II) *dispatch emergency responders*," directly repudiating the Commission's previous decisions precluding use of 9-1-1 Fees for radio assets.

The statutory language does not restrict use of 9-1-1 Fees to funding radio assets used *exclusively*

¹⁸ Even PSAP Radio Consoles may be used to monitor fire-fighting and other First Responder activities to expedite dispatch of additional units or assets when called for by on-scene First Responders, in addition to being used to dispatch First Responders to 9-1-1 calls.

¹⁹ Report and Order, fn. 138 at 23 (citations omitted).

to dispatch emergency responders. Thus, the Commission's referral of the issue to the "Strike Force" creates unnecessary uncertainty. Despite the Commission's apparent dispute with Congress including radio assets as permissible expenses; there is no moratorium on public safety incidents and PSAPs must continue to dispatch First Responders to those incidents.²⁰ The Commission's referral to the Strike Force of the "issue" of 9-1-1 Fee funding of radio assets used in the dispatch of First Responders is arbitrary, capricious and an abuse of discretion. The Commission should follow Congress direction in §615a-1(f)(5)(B) of the Act and make clear in its Rules that use of 9-1-1 Fees to pay for radio assets used to dispatch First Responders is permissible.

Respectfully submitted,

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²⁰ Even if the Commission does not accept Congress' resolution of 9-1-1 Fee-funding of public safety radio assets, the Commission should provide "check-box" waivers on its 9-1-1 Fee Surveys allowing States and local jurisdictions to use 9-1-1 Fees for radio assets external to the PSAP in the four very conservative use cases described in BRETSA's Comments: (i) PSAP service areas of greater than 1,000 square miles with a population density of 35 persons per square mile or less, or service areas of any size with a population density of 25 persons per square mile or less, (ii) PSAP service areas in which dispatch radio signals are subject to terrain shielding, for purposes of providing coverage to otherwise terrain-shielded areas, (iii) PSAP service areas in which weekly traffic counts on an Interstate Highway transecting the PSAP service area exceed the population of the service area by a factor of 10, (iv) PSAPs service areas in which 25 percent or more of the land is owned by the Federal Government, or in which federal government employees use radio frequencies licensed to local public safety entities, local public safety radio systems including local PSAP or public safety agency repeaters to make calls-for-service to the PSAP, or to receive emergency or non-emergency calls from the PSAP pertaining to the incidents or matters occurring on the federal lands.